

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-1270

B
PMS

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ERNEST OLSEN,

Defendant-Appellant.

*On Appeal From The United States District
Court For The Eastern District of New York*

Appellant's Brief



IRVING KATCHER
Attorney for Defendant-Appellant
38 Park Row
New York, N.Y. 10038
(212) 227-0073

TABLE OF CONTENTS

	<u>Page</u>
Statement	1
The Issues Presented To This Court For Review ...	1
Facts	2
POINT I - Appellant's Legal Abduction From A Non-Consenting Sovereignty Voided A Sub- sequent Conviction for Violation of the Narcotics Laws	12
POINT II - Inclusion of Evidence Of Other Crimes And Events Not Charged In Indictment Denied Appellant A Fair Trial.....	13
Conclusion	15

CASES CITED

<u>United States v. Jerry</u> , 515 F. 2d 130, 151	14
<u>United States of America v. Lera</u> - F. 2d - (2nd Cir. Dec. 4/15/75 No. 716, slip opinion) ...	12
<u>United States Ex. Rel. Leyan v. Gengler</u> , 510 F. 2d 62, 65	13
<u>United States v. Papadakis</u> , 510 F. 2d 287, 289 ..	14
<u>United States v. Toscanino</u> , 500 F. 2d 267, 272 ..	13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 75-1270

- against -

ERNEST OLSEN

Appellant.

STATEMENT:

This is an appeal from a judgment of conviction entered July 11, 1975 after a trial before Honorable Jacob Mishler and a jury in the United States District Court for the Eastern District of New York. Appellant was sentenced to a concurrent term of imprisonment for five (5) years upon his conviction for conspiracy to violate the narcotics laws of the United States and to substantive counts in violation of U.S.C. Title 21, Section .

THE ISSUES PRESENTED TO THIS
COURT FOR REVIEW:

1. Did Appellant's legal abduction from a non-consenting sovereignty void a conviction for violation of the narcotics laws of the United States?
2. Was the inclusion of evidence of other crimes and events not charged in the indictments so prejudicial as to deny appellant a fair trial?

FACTS:

Angered at not being paid for shipping narcotics for Ma Sze Tsung, hounded by suppliers for money and broke, Wong Shing Kong contacted the American Embassy in Bangkok through a priest he had befriended. And in the capable hands of special agent O'Grady of the Bureau of Narcotics and Dangerous Drugs Wong Shing Kong was flown to Washington, D.C. put up in hotels, given expense money and paid for his information. An electronics business in which Wong Shing Kong was a partner was partially capitalized by government funds (75-80, 84-88)*.

After this prosecution Wong Shing Kong related to the jury his entrance into the narcotics importation business in 1968 or 1967. Whatever the year, Wong Shing Kong was an electrician on the Nicoline Maersk. Before commencing a voyage Wong Shing Kong spoke to Yueng Tak in Hong Kong. Yueng Tak put him in touch with Wu Luing Kei in Singapore. Wong Shing Kong was given 20 pieces of heroin. Burdened with these 20 pieces, in August 1968 Wong Shing Kong contacted appellant, a shipmate whom he had known for 7 to 8 months, and offered him a half a piece if appellant would take the heroin ashore in New York City. Wong Shing Kong was sure the person

*() Refers to minutes of the trial record.

recruited was not another seaman named Peer but appellant despite Wong Shing Kong's testimony before a grand jury in the Southern District of New York that appellant was not recruited until after Wong Shing Kong met with Ma Sze Tsung on June 4, 1974; after the outside date of this conspiracy is claimed to have been viable. Nonetheless according to Wong Shing Kong appellant agreed and the heroin was taken aboard the Nicoline Maersk in Singapore (7, 17-21, 133).

Once in New York City Wong Shing Kong met George Sun; an illegal alien. Mr. Sun was permitted to plead guilty to harboring aliens in order to aid him in avoiding deportation. This was in return for Mr. Sun's cooperation. According to Mr. Sun, Wong Shing Kong delivered a raincoat to him on this occasion (22, 295-297).

Concerning this shipment of narcotics, Wong Shing Kong testified that the ship left New York City and sailed to Philadelphia. There Wong Shing Kong searched for a buyer, Chueng Kin Lam. Chueng King Lam was told that the heroin would be taken ashore by appellant and two seamen. Wong Shing Kong and Chueng Kin Lam drove to the pier to await the disembarkation.

Chuenq Kin Lam was given 11-1/2 pieces and the appellant and the seamen paid \$300.00 a piece. According to Wong Shing Kong the transaction was COD. However Chuenq Kin Lam was short and the balance was carried over to the next time the ship was in Singapore (22-25).

While in Singapore Wong Shing Kong met Wong Sun Yee. Wong Shing Kong told Wong Sun Yee of a potential buyer of opium in the United States. Wong Sun Yee replied that he could supply 10 pounds, which he did. Opium was taken aboard ship without appellant's aid and when the ship lay in anchor in New York harbor during the dock strike of April 1969 some samples were taken by Wong Shing Kong to George Sun who was then living at 190 Bay 19th Street, Brooklyn, New York, again without the aid of appellant. According to Wong Shing Kong, George Sun called Chaing Kan Chenog. Chaing Kan Chenog arrived at Sun's house and took the samples. Wong Shing Kong saw Chaing Kan Chenog again at a theatre in Chinatown, New York City. A Danish seaman Peer (not appellant) accompanied Wong Shing Kong. Two packages of opium, five pounds each, were carried from the ship. Wong Shing Kong was paid \$6,000, George Sun received \$600.00; \$700.00 was paid to Peer and Wong Shing Kong left New York in June of 1969 on the Clifford Maersk bound for Hong Kong. George Sun's testimony differed however in that he did not testify to placing a call to Chaing Kan Chenog

and according to Mr. Sun his payment was only \$500.00 (26-31, 298-300).

Wong Shing Kong left a telephone number and address when he left the United States. And soon after he received a letter from George Sun requesting a shipment of narcotics for Chaing Kan Chenog. During that time appellant was reported to have also written Wong Shing Kong requesting merchandise to import. Appellant's letter was destroyed. But Sun's letter was given to Yueng Tak. Yeung Tak in turn introduced Wong Shing Kong to a supplier from Bangkok Chaing Kin Fai in November of 1969. Wong Shing Kong showed Chaing Kin Fai, George Sun's letter and told Chaing Kin Fai that he had the means of shipment from Malaysia. An agreement was reached for narcotics to be taken from Malaysia to New York even before Wong Shing Kong had discussed this matter with appellant. It was at a meeting in Hong Kong that this proposition was put to appellant for his approval. Appellant was asked to recruit others for this venture. (32-38).

One problem was that appellant was not sailing to Malaysia. This purported confusion was finally reconciled after much to do by securing the aid of an immigration official in Bangkok to aid in bringing narcotics aboard appellant's ship the

Lexa Maersk (38-40).

Twenty (20) pounds of opium and three (3) units of heroin were placed in appellant's cabin. Wong Shing Kong and Cheing Kin Fai flew to Singapore to secure more narcotics to fill the order. None was available. Appellant was told of this in Singapore and that a further attempt to secure more narcotics would be made in Manila. Appellant's ship sailed for Indonesia and the Manila. Wong Shing Kong went to Bangkok and then Hong Kong and flew on to Manila in November of 1969. In Manila Wong Shing Kong waited at the Fortuna Hotel for Chaing Kin Fai (40-43).

A few days later Chaing Kin Fai arrived with Ngan San Tung who was to increase the heroin shipment. Appellant's approval was secured according to Wong Shing Kong and a watchman was hired to protect the shipment. On the day the ship was to leave Chaing Kin Fai asked Wong Shing Kong to check into the Manila Hotel. This accomplished, Ngan San Tung sent someone to the hotel with the heroin. It was arranged that appellant come to the hotel that night with the watchman and take the heroin aboard ship. After the package was aboard the ship Wong Shing Kong was told of this by the watchman who was promised \$100.00 (43, 44).

Appellant sailed for New York and Wong Shing Kong left Manila. In either November or December of 1969 Wong Shing Kong travelled to Hong Kong and then Bangkok to procure a United States visa. Visa and passport, Wong Shing Kong returned to Hong Kong to await appellant's telegram of arrival in New York City. Receipt of notification of the ship's arrival prompted a telegraph to George Sun (44-46).

Wong Shing Kong then left Hong Kong, flew to Seattle, Washington and then to New York arriving January 1970. He was met at J.F.K. Airport by George Sun and taken to Sun's home in Brooklyn. The ship had not yet docked. According to Wong Shing Kong, Mr. Sun called Chaing Kan Chenog to tell him of the availability of narcotics upon appellant's ship's docking in New York harbor. This telephone call is absent from George Sun's testimony (46, 47). Wong Shing Kong drove to the pier to greet the ship. When appellant alited, he was asked when the goods would be unladen. Appellant replied that evening. Two other persons aided in the operation. One informed Wong Shing Kong of the transfer. The other drove Wong Shing Kong's automobile as instructed by Wong Shing Kong to George Sun's house without the narcotics and then took the narcotics which were in a seaman's bag to George Sun's house. Narcotics were taken out of the bag and put under the refrigerator. Wong

Shing Kong returned the driver and appellant to the wharf and promised to pay them the next time. When George Sun returned he was told where the narcotics were. A telephone call to Chaing Kan Chenog by George Sun was testified to by Wong Shing Kong; no such call was related by George Sun. According to Wong Shing Kong's version Chaing Kan Chenog told George Sun that he wanted sampled. That evening Wong Shing Kong bought the samples. Chaing Kan Chenog's bid was below the offer and the deal fell through. Only one pound of opium was sold (47-51, 302-305).

A chance meeting in Chinatown, New York City, provided Wong Shing Kong with a buyer (the government later was a witness). Wong Shing Kong had met Lam King Sang aboard ship in 1965 when both were seaman. At their meeting in Chinatown Wong Shing Kong asked Lam King Sang if he knew purchasers of narcotics. Lam King Sang replied affirmatively and telephone numbers were exchanged. According to Wong Shing Kong, Lam King Sang called in January of 1970. As per Lam King Sang's version, Wong Shing Kong telephoned. This telephone call resulted in a further meeting in Chinatown where Wong Shing Kong was introduced to Lee Luie and Elong and left samples with them. Lam King Sang testified as to sales to Lee Luie Gean Lui and Hom Git. Lam King Sang was paid in excess of

\$1,000 for this introduction. A complicated procedure whereby appellant and the two seaman who had transported the drugs bussed in from Baltimore, Maryland, telephoned Wong Shing Kong at George Sun's house and Wong Shing Kong took money to a 34th Street bus station culminated in the payment of appellant's \$3,000 fee (51-58, 309-314).

Unable to sell the remaining narcotics originally earmarked for Chaing Kan Chenog, Wong Shing Kong left them with Lam King Sang and Tung Yue Sun when he returned to Hong Kong in March of 1970. Lam King Sang sold the narcotics left with him to George Wong in San Francisco and the money was sent to Wong Shing Kong (58, 316).

While in Bangkok during June of 1971 Wong Shing Kong met Ma Sze Tsung, a narcotics and jewelry exporter who supplied him with 50 units of heroin and 40 pounds of opium. Appellant vacationing in Bangkok met Wong Shing Kong. Appellant was told of the fresh supply. Arrangements to safely take the merchandise aboard ship failed. Appellant was required to fly to Hong Kong where arrangements were made to transport the narcotics in false bottom suitcases. Appellant and Wong Shing Kong flew to Bangkok in August 1971 with the suitcases. Two suitcases were taken with appellant as luggage. Another two suitcases were shipped. Appellant flew to

New York City where he was to contact Lam King Sang. In August 1971 Lam King Sang received a telephone call from a man requesting a meeting in a Brooklyn bar. The man turned out to be appellant. Lam King Sang drove appellant to a New York City hotel. Appellant was carrying two suitcases. After appellant was checked in and was in his room, the narcotics were removed from the suitcases and given to Lam King Sang. The following day Lam King Sang took appellant to J.F.K. Airport to get the other two suitcases. These suitcases were taken to Lam King Sang's house. Lam King Sang wrote Wong Shing Kong of appellant's arrival. These narcotics were sold by Lam King Sang (58-71, 317-319).

A further shipment of narcotics in false bottom suitcases in November 1971 and a meeting in New York City with appellant and Wong Shing Kong was testified to by Lam King Sang. No such transaction was included in Wong Shing Kong's testimony. According to Lam King Sang's version he was given one suitcase and informed that the others were bound for Vancouver. Another shipment of narcotics testified to by Lam King Sang which transaction is missing from Wong Shing Kong's testimony was purported to have occurred in March of 1972 when Lam King Sun met appellant at his home and went with appellant to pick up three false bottom suitcases at the Seaman's Club (319-322).

These suitcases were purportedly taken to the United States by John Thomsen, a Danish seaman who appellant had recruited pursuant to Wong Shing Kong's request. According to Mr. Tomsen, he met Stanley Wong, appellant's partner, and Charlie Tse at appellant's home. They helped Mr. Thomsen pack the false bottom suitcases. These suitcases came to New York with Mr. Thomsen and were left at the Seaman's Club in appellant's name. Mr. Thomsen related another shipment from Stanley Wong which he took to the United States late in 1972 when he was arrested on information given to the authorities by Wong Shing Kong. Wong Shing Kong also related appellant's participation in jewelry smuggling. (71, 254, 268, 269, 292, 382-389, 393, 394).

POINT I:

APPELLANT'S LEGAL ABDUCTION FROM
A NON-CONSENTING SOVEREIGNTY VOIDED
A SUBSEQUENT CONVICTION FOR VIOLATION
OF THE NARCOTICS LAWS.

At the time of sentence, appellant, a Danish seaman,
informed the Court:

"I was kidnapped from a ship that was anchored
outside of Panama;" (Sentence Minutes, A64)

taken from the Chastne Maerask, anchored in Balboa, Panama,
outside of the Canal Zone and taken to the Canal Zone and
then to the Eastern District of New York to stand trial (A63-A73)

As most recently enunciated in U.S.A. v. Lera - F. 2d -
(2nd Cir. Dec. 4/15/75 No. 716, slip opinon):

"Our decision in Toscanino was grounded on the
same principles which underlay the Supreme
Court's adoption of the exclusionary rule in
Mapp v. Ohio, 367 U.S. 643 (1961). In both
cases the purpose of the rule was to deter
police misconduct by barring 'the government
from realizing directly the fruits of its own
deliberate and unnecessary lawlessness in
bringing the accused to trial', (500 F. 2d at
272). Hopefully divestiture of jurisdiction over
a defendant forceably abducted by our Govern-
ment from a foreign jurisdiction would inhibit
our Government from engaging a similar unlaw-
ful conduct in the future. However, where the
United States Government pays no direct or
substantial role in the misconduct and the
foreign police have acted not as United States
agents but merely on behalf of their own govern-
ments, the imposition of a penalty would only
deter United States representatives from making
a lawful request for the defendant would not
deter any illegal conduct." (P. 2876, 2877).

Although appellant did not relate a tale of "police brutality and lawlessness" resulting in "cruel, inhuman, and outrageous treatment", a summary dismissal of his claims was unwarranted. United States v. Toscanino, 500 F. 2d 267, 272; United States Ex. Rel. Leyan v. Gengler, 510 F. 2d 62, 65. Historically this country's concern with freedom of the seas and protection of its merchant seaman has involved it in numerous wars to protect that right. Shanghaing of a foreign seaman from a foreign ship anchored in foreign waters is a gross violation of international law. No such claim should escape judicial inquiry.

POINT II:

INCLUSION OF EVIDENCE OF OTHER CRIMES
AND EVENTS NOT CHARGED IN INDICTMENT
DENIED APPELLANT A FAIR TRIAL.

Appellant was charged with engaging in the illegal narcotics traffic from January 1, 1969 through June 30, 1970. Evidence was introduced starting from August 1968 through and including March 1972. A transaction between a government witness Wong Shing Kong in which there is no evidence that appellant took any part or even knew of this transaction, was presented to the jury as part of the evidence of appellant's involvement in this conspiracy.

Testimony by the government's witness also involved appellant in a jewelry smuggling operation. (20-34, 57-74, 268, 292, 317, 322, 382-394).

An overwhelming portion of the testimony at trial was involved with these events. One witness, John Thomsen testified to events which were claimed to have taken place more than one year after the terminal date of the conspiracy charged in the indictment (382-394).

Recently,

"This Court...held that evidence of other criminal offenses is admissible if it is relevant to some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." (U.S. v. Papadakis, 510 F. 2d 287, 289).

"The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is permissible except when offered solely to prove criminal character." (U.S. v. Jerry, 515 F. 2d 130, 151).

It is submitted that the cumulative testimony in the instant case involving activities outside the pervue of the conspiracy charged amounted to evidence of "criminal character" and far outweighed any provitive value that might be derived from such testimony.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED OR IN THE ALTERNATIVE THIS
MATTER SHOULD BE REMANDED TO THE
TRIAL COURT FOR A HEARING ON THE
QUESTION OF WHETHER APPELLANT WAS
ILLEGALLY ABDUCTED.

Respectfully submitted,

IRVING KATCHER

JERALD ROSENTHAL
Of Counsel on the Brief

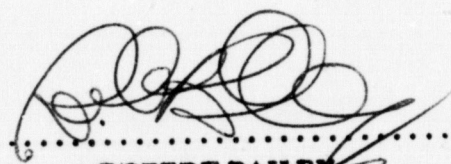
STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 2 day of Sept, 1975 deponent served the within Appendix upon U.S. Attorneys

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East
Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....

ROBERT BAILEY

Sworn to before me, this 2 day of Sept, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976

